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JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

October Term, 1969

No. 1477

GLEN ALDEN CORPORATION, MESHULAM RIKLIS, DOROTHY H. AND LEWIS ROSENSTIEL FOUNDATION, R. G. SMITH, E. R. DEUTSCHE, D. D. BUSCHER, H. S. FELDMAN, SYLVAN OESTREICHER, J. L. MORRIS, THEODORE GOMMI, D. A. CHERNOW, W. E. DEVEREAUX, BERNARD GOLDBERG, G. D. KUHN, L. B. NICHOLS, JOHN MACKIE AND THEODORE C. WIEHE,

Petitioners,

v.

ALEXANDER KAHAN, On Behalf of himself and all others similarly situated,

Respondent.

PETITIONERS' REPLY BRIEF TO BRIEF IN OPPOSITION

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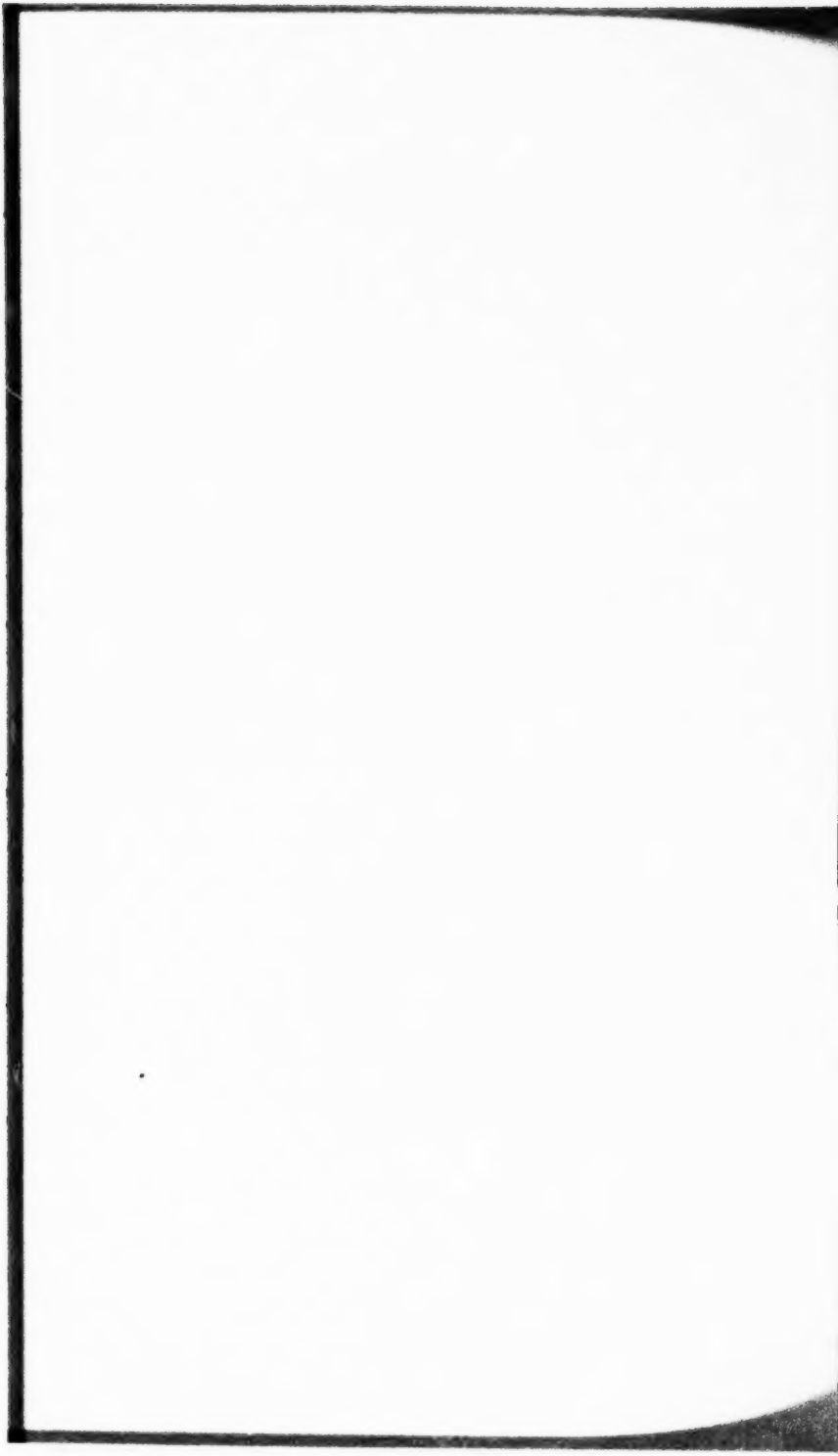

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v.

ALEXANDER KAHAN, on behalf of himself and all others similarly situated,

Respondent.

PETITIONERS' REPLY BRIEF TO BRIEF IN OPPOSITION

The 1966 amendments to Rule 23 of the Federal Rules of Civil Procedure are completely irrelevant to the issue decided by the Court of Appeals for the Second Circuit in *Wolf v. Barkes* and the present decision is in direct conflict with that determination.

Respondent attempts to avoid the direct conflict between the present decision and the decision of the Court of Appeals for the Second Circuit in *Wolf* v. *Barkes*, 348

F.2d 994 (2d Cir. 1965), *cert. den.*, 382 U.S. 941 (1965), as to the scope of Rule 23 of the Federal Rules of Civil Procedure (see Petition for Writ of Certiorari, pp. 11-14), by suggesting that the *Wolf* decision is somehow vitiated by the 1966 amendments to Rule 23. This contention is completely without support.

The 1966 amendments to Rule 23 did not alter the provisions of the Rule concerning dismissal or compromise of class actions, and were not concerned in any way with the inapplicability of these provisions to out-of-court transactions not invoking judicial process. Thus, the requirements of notice and approval which are now contained in Rule 23(e) are the same requirements that pertained when the *Wolf* case was decided; indeed, the Court of Appeals in *Wolf* pointed out that these requirements clearly would have been applicable if a judicial compromise or dismissal had been sought.

Significantly, respondent cites no cases, either prior or subsequent to the *Wolf* decision, which are inconsistent with *Wolf* in any way, or which suggest that either old Rule 23(c), or its counterpart, new Rule 23(e), applies to or restricts out-of-court action. Thus, the present decision is in clear and direct conflict with the prevailing law, as embodied in *Wolf*, on an issue of overwhelming importance in an increasingly significant area of litigation. We respectfully suggest that this Court should resolve this conflict, and should exercise its power of supervision on this important question.

For this reason, and for the reasons stated in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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